

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

<b>WESTROCK SERVICES, INC.</b>	)	
	)	
<b>and</b>	)	
	)	<b>Case 10-CA-195617</b>
	)	<b>Honorable Robert Ringler</b>
<b>GRAPHIC COMMUNICATIONS</b>	)	
<b>CONFERENCE OF THE INTERNATIONAL</b>	)	
<b>BROTHERHOOD OF TEAMSTERS,</b>	)	
<b>LOCAL 197-M</b>	)	

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**POST-HEARING BRIEF OF RESPONDENT WESTROCK SERVICES, INC.**  
**TO ADMINISTRATIVE LAW JUDGE ROBERT RINGLER**

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## **ISSUES**

1. Does the GC meet his burden of proving pre-petition allegations his own witnesses refute?

a. Does the GC prove inconsistent solicitation rule application when all testify to its consistent application to union and non-union subjects?<sup>1</sup>

b. Does the GC prove a supervisor's unlawful interference with a claim the supervisor asked a union steward (that she neither supervises nor speaks to) to serve decertification cards to her nephew and his co-worker when all but the steward deny this account, and his version contradicts others' and is internally unbelievable?<sup>2</sup>

c. Does the GC prove an unlawful raise promise when the plant manager answers a unit employee's raise request by explaining the contract governs the wage so it cannot be changed unless the contract being renegotiated goes through or the Union is gone?<sup>3</sup>

d. Does the GC prove unlawful promises at a scripted meeting when both the script and union steward notes reflect no promises were made? *Supra* note 3.

2. Does the GC prove post-petition allegations even his own witnesses refute?

a. Does accepting an unsolicited folded piece of paper from an employee constitute unlawful assistance?<sup>4</sup>

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<sup>1</sup> St. Margaret Mercy Healthcare Centers, 350 NLRB 203, 207 (2007)(§8(a)(1) and (3) requires following solicitation policy consistently); see Lockheed Martin Skunk Works, 331 NLRB 852, 855 (2000)(not grounds for election objection if existing email policy is consistently applied).

<sup>2</sup> See Vernon Mfg. Co., 219 NLRB 622, 622 (1975) (no proof by "preponderance of evidence" when the "overwhelming weight" of 15 witnesses contradicted the GC's version of the facts).

<sup>3</sup> See Lee Lumber & Bldg. Material Corp., 306 NLRB 408, 410 (1992) (employer may provide truthful information).

<sup>4</sup> See Eastern States Optical Co., 275 NLRB 371 (1985) (employer does not provide unlawful assistance by allowing employee to sign a decertification petition in supervisor's presence).

- b. Does offering an accurate example to answer an employee's question about retirement violate §8(a)(1)?<sup>5</sup>
- c. Does a scripted speech whose script and union steward notes reflects no promises establish unlawful promises? See supra note 3.
- d. Do statements by rank-and-file employees from a different facility about a previously-held decertification election (at that location) constitute a violation of §8(a)(1)?<sup>6</sup>
- e. Does a scripted talk about 401(k) contributions elsewhere and one calculation in response to an employee question constitute an unlawful promise?<sup>7</sup>
- f. Does a single inquiry about whether two friends have a problem constitute unlawful interrogation when no union issue is mentioned?<sup>8</sup>

### **PROCEEDINGS**

This matter comes before the National Labor Relations Board's ("Board") Administrative Law Judge ("ALJ") Robert Ringler for determination of an Unfair Labor Practice Charge filed by the International Brotherhood of the Teamsters' Local 197-M ("Teamsters" or "Union") legal representative Peter J. Leff ("Leff") against Respondent WestRock Services, Inc. ("WestRock") in Chattanooga, Tennessee.

The Teamsters filed the charges underlying this proceeding filed just three days after petitioner Joe Pike, an individual employee, filed with the Board an RD petition<sup>9</sup> supported by at

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<sup>5</sup> Langdale Forest Prod. Co., 335 NLRB 602, 603 (2001) (employer may make comparisons).

<sup>6</sup> See Omnix International Corp. d/b/a Waterbed World, 286 NLRB 425, 426-27 (1987)(why not agents); Manhattan Hosp., 280 NLRB 113, 126-127 (1986)(why meetings lawful).

<sup>7</sup> Langdale Forest Prod. Co., 335 NLRB 602, 603 (2001) (employer may make comparisons).

<sup>8</sup> Rossmore House Hotel, 269 NLRB 1176, 1178 n.2 (1984).

<sup>9</sup> Joe Pike filed the RD Petition on March 24, 2017 (Case 10-RD-195447).

least 30% of the workforce seeking an election to decertify Teamsters 197.<sup>10</sup> On June 28, 2017, Acting Regional Director Terry Combs dismissed the petition. Case 10-RD-195477. He stated falsely that he relied on "witness testimony" regarding ULPs, implying a hearing he never held.<sup>11</sup> The new Acting Regional Director, Lisa Henderson, issued a Complaint and Notice of Hearing against WestRock in the second proceeding, Case 10-CA-195617, on July 24, 2017 (subsequently amended on October 26, 2017), contending that WestRock committed twelve separate 8(a)(1) violations, both during the "pre-petition" and during the "post-petition" phases. The Complaint filed against WestRock in Case 10-CA-195617 contained allegations of pre-petition conduct that might have, if proven at hearing, "tainted" Petitioner Pike's Petition Case 10-RD-195477. WestRock denies that it had committed any of the unfair labor practices alleged.

Shortly before the ALJ's ULP hearing, the Respondent and Petitioner filed a Joint Request for Review of the Acting Regional Director's Administrative Dismissal of the RD Petition in Case 10-RD-195447. The Board denied this request, *supra* note 11, but raised crucial issues in two footnotes, now relevant, stating (emphasis added):

1. In denying review, we find that the Acting Regional Director's dismissal of the petition was fully consistent with the Board's blocking charge policy, insofar as the unfair labor practice charge at issue alleges conduct that, if proven, may invalidate the petition or some or all of the showing of interest submitted in support of the petition. See NLRB Casehandling Manual Part Two, Secs. 11730.3(a) and 11733.2(a)(1). Shortly after the petition was dismissed, the Acting Regional Director found merit to the charge at issue here and issued a complaint in Case 10-CA-195617, which is currently scheduled for a hearing before an administrative law judge. Although the Acting Regional Director's letter dismissing the petition contains language suggesting that the conduct alleged in the charges had already been proven, we find that this was an inadvertent error.

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<sup>10</sup> The original Unfair Labor Practice Charge in this case was filed on March 27, 2017 and subsequently amended six separate times: on March 28, 2017, April 6, 2017, April 21, 2017, April 21, 2017, May 1, 2017, June 6, 2017, and July 6, 2017.

<sup>11</sup> See WestRock Servs., Inc., and Joe Pike and Graphic Communications Conf, IBT Local 197 M p. 1 (Oct. 27, 2017).

Further, consistent with the blocking charge policy, *the petition is subject to reinstatement, if appropriate, upon final disposition of the unfair labor practice proceedings*, and the Petitioner is made a party in interest to Case 10-CA-195617 solely for the purpose of receiving notification of the final outcome of that case. See generally NLRB Casehandling Manual Part Two, Sec. 11733.2(b).

2. Member Kaplan agrees with the decision to deny review here. He notes, however, that he would consider revisiting the Board's blocking charge policy in a future appropriate case. Member Emanuel agrees that the dismissal of the petition in this case was permissible under the Board's current blocking charge policy, but he believes that the policy should be changed. Specifically, *he believes that an employee's petition for an election should generally not be dismissed based on contested and unproven allegations of unfair labor practices*.

Administrative Law Judge Ringler ("ALJ") held a hearing on the Complaint in Chattanooga Tennessee on November 30-31, 2017 and January 30-31, 2018. The evidence at hearing established that no allegations will survive. At the conclusion of the hearing, the ALJ instructed the parties to submit a post-hearing brief. WestRock submits this Post-Hearing Brief demonstrating that WestRock did not engage in any impermissible pre-petition or post-petition conduct, and that the General Counsel ("GC") otherwise failed to produce evidence supporting his remaining claims.

### **STATEMENT OF FACTS**

WestRock operates a graphics printing facility in Chattanooga, Tennessee where it employs approximately 160 employees. (GC-1(k), ¶2(a))<sup>12</sup>. Many hourly employees at WestRock have been employed for decades, resulting in a very familiar, laid-back workforce. Witnesses' tenure reflects the foregoing.<sup>13</sup>

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<sup>12</sup> In record cites, the transcript is abbreviated "T". After each cite, the page number and line of cite is listed. WestRock's, or Respondent's exhibits are labeled "RX" and Counsel for the General Counsel's exhibits are labeled "GC" followed by the number.

<sup>13</sup> Sheila Smith has worked at the facility for 31 years; (T501:21-25) of which 27 have been in supervision. *Id.* 502:1-2. Ken Frost has worked at the facility for 25 years (T136:17-22); and Bill Bearden has worked at the facility for 21 years. T276:7-8.

WestRock has no assembly line. (RX-3). Work is skilled and generally is carried on by either one or small groups of employees using tools or making occasional adjustments while watching presses run in small work areas. T603:17-604:23 (Randy Reed, hereinafter "Randy"). The bulk of the workforce either tends machines, maintains them, provides materials to them, or takes product from them for packaging. This type of work offers an unusually free environment and provides numerous opportunities for on-the-clock conversations. Machine operators and assistants have these opportunities once machines are up and running during the shift and once they have been shut down and squared away at its end. Id. Maintenance and material handlers have this opportunity through mobility that is part of their jobs. See id.

Most hourly employees (approximately 111) at WestRock are represented by the Teamsters 197, and have been for decades. T30:4-8, 598:5-8, 599:16-20. Employee work rules are contained in the Collective Bargaining Agreement between WestRock and the Teamsters 197, and also contained in WestRock's employee handbook. T30:22-24. For example WestRock has the following policy regarding solicitation that provides in relevant part:

Employees. Employees are not permitted to solicit other employees, customers, contractors or vendors, or to distribute documents or non-business related items of any kind during the working time of any of the employees involved. Working time is the period when an employee is expected to be performing job duties but excludes approved meal and break periods.

Employees are not permitted to distribute documents or non-business related items in working areas at any time. Working areas are the areas that the Company has designated for work and include offices, conference rooms and the plant floor but exclude break rooms and parking lots.

GC-2. This rule's facial validity is undisputed; only its application is in issue.

WestRock consistently interprets this policy to allow employees to discuss virtually any subject (including union subjects) at any time or place as long as the discussion does not interfere

with any duties actually being performed at the time.<sup>14</sup> No one has ever received discipline for discussing union business on company time in company work areas.<sup>15</sup> The Union has never grieved this interpretation.<sup>16</sup>

This policy interpretation works for this facility because the nature of the business allows machine operators considerable free time once a machine is up and running, allows remaining unit employees many opportunities to move about the plant, and gives many employees paid time on the clock at the end of the shifts to do what they want once work areas are squared away.<sup>17</sup>

Longtime machine operator Joe Pike began circulating a petition to decertify Teamsters 197 in February of 2017. See T529:12-25, 541:4-17 (Pike). On two specific days, after he had squared away his machine at the end of his shift, he stood in a non-work warehouse area and sought support from incoming third shift employees whose shift had not yet begun. See T545:4-24 (Pike); T606:24-607:6 (Randy). Pike never interfered with anyone's duties. T544:10-20.

Sheila Smith is a supervisor in the Finishing Department. T498:22-23. She worked as a union member for 4 years (T505:3-6), including serving as union steward (T505:14-15); and as a supervisor for 27 years. T502:1-2. She does not supervise Union Steward Taylor Walker, does not have any relationship or interaction with him on or off the job, and does not talk with him about the union or anything else. T511:11-13, 512:2-20, 513:11-17, 514:7-9 (Smith).

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<sup>14</sup> T602:3-603:12, 623:5-21 (Randy); 69:9-25 (Steward Johnson); 191:8-13, 192:18-22 (Steward Brown); 438:10-16 (Steinaway; saw union business done during work time in work area); 487:7-19 (Lawrence; can talk about whatever one wants); 488:1-7 (Lawrence; saw union business done). Compare T603:13-605:6 (Randy; explains rule) with T111:13-15, 129:23-25 (Steward Walker; supervisor asked him to wait to speak to Leah Johnson once because she was operating her machine).

<sup>15</sup> T602:17-22 (Randy); 70:16-18 (Steward Johnson), 130:13-15 (Steward Walker).

<sup>16</sup> See, e.g., T74:11-17 (Steward Johnson); 130:16-18 (Steward Walker).

<sup>17</sup> T603:16-604:10 (Randy).

She never has asked Union Steward Taylor Walker to get decertification cards from Joe Pike to give to her nephew and his coworker. T514:16-20, 515:9-15, 516:1-3 (Smith), 479:12-16 (Lawrence). All but Walker deny such a conversation occurred, T514:16-20, 515:9-15, 516:1-3 (Smith), 483:13-484:22 (Lawrence), and even Walker concedes he never spoke to Smith about such matters before or after that occasion. T128:14-18. External, compare T94:14-18 (Steward Johnson) with 127:24-28 (Steward Walker), as well as internal, compare T130:25-131:9 with 131:21-132:5, contradictions make Walker's story unlikely.

Jamie Ford is a Quality Assurance Inspector. T233:15-16. Prior to July of 2017, she was a Finishing Helper. T233:19-21. She changed jobs because the new job gave her a raise due to its higher assigned wage rate under the contract. T256:17-22. She had frequently asked for a raise in her prior job but had topped out under the contract for her classification. T608:8-21 (Randy). On or about March 1, 2017, she participated in a conversation with Randy and supervisor Charlie White. Charlie asked, "When are we going to get this girl paid?" Randy responded, he could do nothing "until the contract goes through or the union is out." T238:22-239:4 (Ford), 607:14-608:13 (Randy). At the time, negotiations on a new contract were ongoing. T609:4-10 (Randy). There was no raise promise. T609:24-610:3 (Randy).

On March 22, 2017, after Randy had received a number of questions from employees about the decertification process, he gave the following scripted speech:

During the past few weeks, many of you have asked questions about the effort being made by a number of our employees to decertify the Teamsters union as your bargaining representative.

In addition, I have received a letter from the Teamsters Local 197-M who also seems to be confused about what is going on at our plant.

So, I thought it would be a good idea for us to get together and make sure that everyone understands what a decertification petition is, what it means for you, and what the legal process is for the

handling of such petitions.

(As you can see, I am reading what I am telling you today because I don't want any question to come up later about what I have said.) Having said that, let me try to answer the questions that some of you have raised.

QUESTION: What does "decertification" mean? ANSWER: The law applicable to union representation recognizes the right of employees, such as you, to determine, by a majority vote whether or not you want continued union representation.

So, you have a right to ask the government (NLRB) to conduct a secret ballot election on whether you will continue to be unionized.

The first step of the decertification process is for at 30% of the employees to express an interest (typically by signing so called authorization cards), and filing a petition with the NLRB requesting a secret ballot election.

QUESTION: Do you know when an election would be held here at our plant?

ANSWER: It would depend on when 30% or more of our employees sign cards supporting decertification. At that point, a petition can be filed with the NLRB. Usually, decertification elections are conducted within four weeks or so from the time a petition is filed. I know everyone would like to get this election over as soon as possible, and I promise to do what I can to avoid any delays in the process.

QUESTION: What do the authorization cards that we are being asked to sign mean and how will they be used in the decertification process?

ANSWER: Authorization cards do not constitute a "vote" by you on whether to decertify the union. Rather, they are used to show the government (NLRB) there is enough support for the certification to justify the conduct of a secret ballot election. The election that follows will determine if a majority of you want to keep the union, or would like to decertify it. Whether you Sign a union authorization card, or not, will not require you to vote in the same way at the secret ballot election.

It is your individual decision whether or not to sign a union card. You have the legal right to choose one way or the other. You have the right to make your decision without being harassed or interfered with by anyone. Unfortunately, we've had some

incidents already where a couple of employees have used offensive language and acted in a very disrespectful way to influence others. If anyone here is subjected to that sort of mistreatment you are welcome to talk with me about it. We'll investigate and take appropriate lawful action to see that any inappropriate behavior stops immediately.

QUESTION: What is the company's position on decertification?

ANSWER: I know that some of you want to hear from us on this issue. However, until we receive notice from the NLRB that an election has been scheduled, we are not legally able to answer your questions and talk with you about our position on the decertification process and its consequences. So, WestRock cannot openly urge you to support or oppose decertification. Therefore, **I want to be very clear at this time that WestRock is not taking any official position on whether you should or should not be for the union.** The certification process was started without our involvement and we will keep it that way until a petition is filed.

However, the law does state that after a decertification petition is filed, WestRock would be able at that time to express our feelings on whether you are better off with or without this union. We would also be able to provide you with all the facts you need to decide whether you should keep the Teamsters here as your representative.

Remember, also, that the decision on whether to file a petition with the NLRB, for a secret ballot election, is yours and yours alone to make. Then, when you vote in the secret ballot election, the decision on whether to keep the union is yours and yours, alone.

QUESTION: If we were to vote to decertify the union, how long would it be before the union would be able to come back into our plant, if we wanted it to?

ANSWER: If a decertification petition is filed, and the union loses the election, the union would have to stay away for a minimum of one year. After one year, the union could come back, if a majority of you were to vote it back in.

QUESTION: Have employees at any other WestRock locations voted to decertify their union? If so, are those locations still in business? Has the company taken anything away from those employees who voted to decertify?

ANSWER: I checked into this and found out that there have been decertification's of unions at some WestRock locations. Some of

these are Conway, Arkansas; North Chicago, Illinois; and Hanover Park, Illinois. All of these facilities are still in business and I am told that all are very successful operations. Nothing was taken away from the employees at these plants after they voted to decertify their union.

#### THE UNION LETTER:

One of the things the union said in its letter to me was to accuse someone of you and the company of intimidating, coercing, and retaliating against employees in support of the decertification effort. That is not true. Instead, I have heard that there have been reports of bullying and threatening comments, but those comments have been directed against those seeking recertification, not with the union claims. Either way, however, I want to make sure that everyone, regardless of your position, understands that we expect all of you to do your job, respect our rules, respect each other, and not engage in any behavior that interferes with our ability to do our jobs and serving customers.

The union also raised in its letter a question of whether the company was allowing those who are supporting the certification to solicit support for their position during working time. *As you know, we do not try to restrict your non-work conversations during working time. However, we do expect that no one will interfere with your own, or anyone else's work.* Let's make sure that we follow that rule and get our work done and serve our customers.

I wish I could say more at this time, but I cannot, other than say that we will continue to follow the law, and do all we can to ensure that this plant is a great place to work.

GC-4 (emphasis added).<sup>18</sup>

On March 24, 2017, Joe Pike filed his petition with the Board to decertify Teamsters 197 supported by at least 30% of the workforce. T584:14-24 (Pike); GC-5. Randy continued to receive questions after the petition was filed. On March 27, 2017, longtime employee Bill Bearden asked Randy how Chattanooga plant retirement compared to the union free plants.

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<sup>18</sup> See T42:15-21 (Steward Johnson); 169:21-170:4 (Steward Brown); 239:19-240:12 (Ford); 282:3-8 (Bearden); 442:8-444:6 (Steinaway); 482:13-483:9 (Lawrence); 554:4-9 (Pike); 260:3-8 (Ford).

T613:20-614:21 (Randy). Randy told Bill and coworker Ken Frost about how Randy's son's retirement worked at the union-free WestRock plant where he was employed. T142:12-24 (Frost), 285:22-286:16 (Bearden). Randy made no promises. T615:7-20 (Randy); 152:16-19 (Frost).

During the conversation with Bearden, longtime employee Ken Frost gave Randy (who did not ask) a folded piece of paper. T143:19-22, 144:3-4, 20-23 (Frost); 615:21-617:2 (Randy). Employees were giving him things all the time. T617:1-2 (Randy) This paper turned out to be a decertification card, which Randy gave Joe Pike. No one else gave him that. T617:16-25 (Randy).

The same day, Randy held several voluntary meetings during which he presented another scripted speech to answer employee questions:

By now most of you know that we will have a decertification election here next month, to decide whether this plant will become union-free. Your vote will be by secret ballot, and it will be done under the supervision of the National Labor Relations Board.

Now that the decertification petition has been filed and an election scheduled, the law allows me to state my position, and WestRock's position, on this very important decision you will make.

I believe that you could all be much better off without having to pay union dues and without being held back by a union contract that prevents WestRock from rewarding you for the great work you do here. This is a great plant and you do a great job for WestRock. I'd like for us to have the chance to see how much better we can do when we are judged on our performance, and not on what is written into a union contract

WestRock believes that you could be much better off without a union because our company prefers to work directly with our employees, and not have plants held back due to the cost and disruption of a union. We believe that your quality of life, your financial condition, and your job security could be better if you are union-free. We therefore encourage you to vote "NO" to the Teamsters during the secret-ballot election next month.

Let me explain why this is all so important to me, Year after year our results are among the best in our company. But it really bothers me to see that employees working at other WestRock plants, who often don't have numbers as good as you have, make more money than you. It bothers me to see that our non-union plants typically are paid better than union plants like this one. I want to see you get out from under the union contract that is holding you back so you can see if you do better without a union here and without union dues. I think you deserve the chance to see what you can accomplish when your contribution to this company is taken into account and there is no union contract holding you down.

You, of course, have the final say in this election. It comes down to this choice. You can vote for a union which many of you don't like and can keep paying dues, or you can chose to vote for a union-free workplace managed by a team you believe in and trust.

During the coming weeks, you can expect the union to tell you to vote based on fear and mistrust. Unfortunately, the union can promise you anything and does not have to make good on their promises. That's the law, I would ask each and every one of you to vote based upon the trust and confidence you have in the leadership here in Chattanooga and WestRock.

When the vote is over, when the ballots are counted, we will focus on our future here in Chattanooga. We will ask for your input about how to make this plant better. We'll treat you fairly regarding wages and benefits and work practices. We'll ensure that you have effective supervisors who treat you fairly and with the respect and appreciation you deserve. And we will put all our commitments in writing.

So as you make your choice concerning your future, I ask that you focus on the future of this plant and our belief in a "one team" approach; I ask that you come together as a team and work together with management to achieve success. I ask that you communicate with each other more effectively and respect each other. I give you my personal pledge as do each and every one of the management team.

Look, the Teamsters have had \_\_\_\_ years, here. All we want is one year to show you that things can be better here union-free. That's all you have to give us. And, once you give us the chance, I am confident a year from now you will have no interest in going back to a union.

I urge you to say to those who assert that "we-need-a-union-here",

you are misguided. There is a better way,

Tell the union by your vote, in loud and clear terms:

- "This company has provided good jobs and steady work,"
- "But we want a brighter future."
- "We can have that future by working together. Not by fighting each other."

The bottom line is that your choice in the coming week is very clear. This decision that you will make will be one of the most important ones you will make as an employee of this company.

You can vote to keep things just the way they are, or you can vote to give all of us the chance to make things much better. I ask you to give us the chance to work with you directly, without the interference of a union, so we can succeed together. I am asking you to vote no to make this plant union-free and help get our plant on the best track to success.

Thank you for your time and your careful attention during the 'next few weeks.

GC-5.<sup>19</sup>

Employees requested that they hear from other WestRock employees who had experienced decertification before. T555:10-21 (Pike), 624:9-17 (Randy). On April 4-5, 2017, David Brooks ("Dave") and Earl Johnson ("Earl"), two rank and file employees from Conway, Arkansas, led approximately ten optional employee meetings in which they discussed their personal experiences with decertification at their Arkansas plant. T323:13-21 (Earl), 383:20-384:10 (Dave), 629:24 (Randy). No one in WestRock management was present for these meetings. T325:2-4 (Earl), 631:12-21 (Randy).

Neither Earl nor Dave are or have been supervisors of WestRock. T321:18-21, 322:20-22 (Earl), 375:6-11, 392:2-4 (Dave), 449:11-450:8 (Steinaway). Neither have authority to hire, fire,

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<sup>19</sup> T49:16-24, 78:20-23, 78:24-79:1 (Steward Johnson), 444:13-445:21 (Steinaway), 612:8-613:4 (Randy); see T153:18-21 (Frost), 446:6-7 (Steinaway).

discipline, evaluate the performance of, or recommend any of the foregoing with regard to employees with whom they work. T321:18-19, 322:20-22 (Earl), 374:13-375:5 (Dave). They do not make out work schedules, and do not assign employees to their various shifts. T321:18-19, 322:20-22 (Earl), 374:13-375:5 (Dave). They do not attend supervisor meetings. T321:18-19, 374:17-20.

Neither Earl nor Dave were WestRock agents. They were always rank and file employees. T320:4-6, 321:18-21(Earl); 377:6-8 (Dave). Neither brought any special word from the Company about Chattanooga's future or anything else. T324:13-15, 329:7-330:11 (Earl); 383:20-384:10, 392:9-18 (Dave). Neither Earl nor Dave had the authority to make any promises during these meetings. T326:3-5 (Earl), 392:5-8 (Dave). Both expressly denied to their audience any authority to speak for WestRock. T321:18-322:22 (Earl), 375:6-11, 377:6-8 (Dave). No testimony contradicted theirs.

Neither Earl nor Dave made any promises.<sup>20</sup> As their testimony and the union's notes reflect, they spoke only about their experience at Conway and specifically stated they had no authority to say, and no way to know, what would happen in Chattanooga.<sup>21</sup> As Union notes also confirm,<sup>22</sup> Earl and Dave never told employees to "read between the lines" when others from Company headquarters spoke.<sup>23</sup>

On April 18, 2017, Scott Pulice, Human Resources, led approximately six optional employee meetings in which he responded to employee questions requesting a comparison of

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<sup>20</sup> T325:23-326:10, 326:6-10, 327:18-24 (Earl); 392:5-8, 393:23-394:2, 394:7-9 (Dave); 450:2-6 (Steinaway).

<sup>21</sup> T329:12-330:11 (Earl), 392:5-394:9 (Dave); RX 62 (Steward Leah Johnson notes)

<sup>22</sup> RX 62 (Steward Leah Johnson notes).

<sup>23</sup> T327:3-10 (Earl), 394:18-21 (Dave), 450:23-451:1 (Rank and file employee Steinaway).

benefits between WestRock's union and non-union facilities. T643:20-22, 646:19-21, 649:17-24 (Randy). Neither Mr. Pulice nor any other WestRock manager made any promises during these meetings. T455:18-456:12 (Steinaway). Mr. Pulice's slides contained approximately 54 disclaimers that promises could not be made and were not being made. T87:20-88:12 (Steward Johnson), 632:5-633:2 (Randy), GC-6.

Teamsters 197 Steward Steve Brown summarized in one answer the problem with the GC's entire case:

Let's just cut to the chase; do you agree that WestRock has not made any promises to employees about what they will get in the event they decertify; do you agree with me?

A. Yes.

T216:6-10 (Steward Brown). Nothing else need be said.

### **SUMMARY OF THE ARGUMENT**

The GC failed to establish that WestRock committed any of the pre-petition or post-petition allegations, as alleged. Instead, the evidence at the hearing paints an entirely different picture. There has not been a grievance filed by the Teamsters 197 in years and, until Pike's 2017 decertification effort, there had never been a single Unfair Labor Practice charge ("ULP") filed. These ULPs represent an effort to deny employees' §9 rights to determine if the union should continue to represent them.

Pre-petition allegations fail. There was no disparate solicitation rule enforcement. The nature of the production process has for decades enabled WestRock to allow employees to discuss any subject (pro-union, anti-union or almost anything else) for reasonable periods on the floor during paid time as long as everyone is able to get the work done. Supervisor Sheila Smith made no preposterous effort to have a union steward get decertification cards for her nephew and

his coworker. Randy's brief discussion with Charlie White about the inability for a unit employee to get a raise unless the new contract reflected it or there were no contract is no ULP. Randy's scripted March 22 remarks reveal no promise.

Post-petition allegations fail. Receiving unsolicited a folded document from an employee and responding to another employee's retirement question with an example, and following a scripted speech that even Union notes reflect included no promises is not a violation. Coworkers from another plant who discussed their experience there is not a violation. Nor is a conversation of union and union-free 401(k) matches. Nor is a discussion among friends about the accuracy of a posting labelling one as a liar. These obstructions must not delay the election further.

The foregoing removes all obstacles to reinstating the recertification petition and enabling employees to exercise §9 rights.

### **ARGUMENT**

The GC has the burden of proof. Pre-petition ULP allegations fail. Post-petition ULP allegations fail. The previously docketed RD election should proceed.

#### **I. The GC has the Burden of Proof**

The burden establishing each of the alleged §8(a)(1) unfair labor practices rests at all times with the GC.<sup>24</sup> "The burden is on the General Counsel to prove by a preponderance of evidence that [WestRock's] conduct violated §8(a)(1) by interfering, restraining, or coercing [employees] in the exercise of [their] Section 7 rights."<sup>25</sup> The GC has failed to meet its burden.<sup>26</sup>

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<sup>24</sup> NLRB v. Transportation Mgmt. Corp., 462 U.S. 393, 401 (1983)("throughout the proceedings, the General Counsel carries the burden of proving the elements of an unfair labor practice").

<sup>25</sup> North Hills Office Services, Inc., 345 NLRB 1262, 1263 (2005) (emphasis added).

<sup>26</sup> Compare Complaint (as amended) ¶¶7-13 with T70:16-18, 74:13-17 (Steward Johnson), 130:13-20 (Steward Walker), 191:18-20, 192:18-22 (Steward Brown).

The burden was not satisfied by this Record. GC witnesses make clear there was no unlawful interference with the Union's message, T192:16-22 (Steward Brown) and no unlawful promises made. T216:6-10 (Steward Brown). Evidentiary voids confirm this testimony. Whereas one would expect a history of grievances and ULPs, the record reveals no relevant grievances and no Union filed ULPs until these. Whereas one would expect threats of plant closure and unlawful polling, the Complaint the GC found worthy of hearing does not contain a single allegation of any of the foregoing. This Complaint is due to be dismissed.

## **II. Pre-Petition ULP Allegations Fail**

The GC cannot satisfy his burden respecting pre-petition allegations. He did not prove Complaint ¶7 disparate solicitation policy enforcement. He did not prove Complaint ¶¶8(a)-(c) Shelia Smith interference. He did not prove Complaint ¶11(a)'s promise of a raise to Ms. Ford. He did not prove Complaint ¶12(a)'s March 22 meeting promises. The pre-petition ULP allegations, created in an effort to undermine employee §9 rights, reveal their true motives when the hearing testimony, the speech script exhibit, and Union notes strip away any possible evidentiary support.

### **A. The GC Did Not Prove Disparate Enforcement of Policy**

The GC, whose complaint **does not raise** a facial solicitation rule challenge, fails to prove Complaint ¶7's disparate solicitation rule **enforcement**.<sup>27</sup> The GC does not prove Complaint ¶¶8(a)-(d)'s claim Sheila Smith asked Taylor Walker to get cards for Sheila's nephew and his coworker. The GC does not prove Complaint ¶11(a)'s claim Randy promised a pre-

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<sup>27</sup> Both Complaint ¶7 and the underlying charges focus solely on the rule's **application**. Compare Complaint ¶7(b) ("selectively and disparately" enforced the rule); GC-1(w)(charges concern only **application** of a rule each time noting solicitation was "**in violation** of company rules")(emphasis added) with Nickels Bakery, 296 NLRB 927, 928 (1988)(complaint cannot raise item not factually related to underlying charge).

petition pay raise. The GC does not prove Complaint ¶12(a)'s claim Randy promised anything at this March 22 speech.

The GC had the burden to prove Complaint ¶7(b) disparate solicitation enforcement. *Supra* notes 1, 24, & 25. The GC failed. Randy explained why machine operation allowed for so much down time that made such regular discussion possible.<sup>28</sup> T603:16-604:10, 604:24-605:6 (Randy). All agreed **all conversation subjects** were fair game as long as no one actually had to be performing tasks.<sup>29</sup> All concede there has been **no instance of discipline** for discussing union business and no instance in the parties' long relationship which the Union has filed a grievance raising this issue.<sup>30</sup>

The record **forecloses** the GC's effort to claim WestRock **applied the rule differently** to Joe Pike's solicitation against the Union than to those speaking in its favor. Joe Pike's solicitation (which enjoys precisely the same §8(a)(1) protection as do all others) fell within the rule because it is **undisputed** that he neither neglected his own duties (T529:12-21, 595:7-24), nor interfered with the actual duties of anyone else (T530:7-9). By contrast, the sole specific instance the "no Union business"<sup>31</sup> claim witnesses identify occurred during Steward Walker's admitted interference with Steward Johnson's actual machine tasks. T129:18-25. In on-the-clock situations lacking such interference, Joe Pike (547:3-23), Patricia Steinaway (438:10-16), and Jeremy Lawrence (488:1-7), among others, offered **uncontradicted** specific examples of

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<sup>28</sup> Unit employee Jenny Lawrence (T479:17-480:6) confirms the foregoing.

<sup>29</sup> T69:22-25 (Steward Johnson), 130:1-7 (Steward Walker), 190:25-191:4, 8-13, 192:18-22 (Steward Brown); but cf. T529:22-530:9 (Pike never interfered with anyone's job task performance).

<sup>30</sup> T70:16-18, 74:13-17 (Steward Johnson); 130:13-20 (Steward Walker; no discipline and no grievance ever); see T191:8-20, 192:18-22 (Steward Brown); 602:2-605:12 (Randy). Virtually every solicitation in which a ULP is found involves such adverse employment actions.

<sup>31</sup> T 32:7-9 (Steward Johnson), 111:13-17 (Steward Walker), and 164:24-65:1 (Steward Brown).

when they witnessed extensive Union business done on paid time; and Randy gave an example **no one disputed** of a 20 minute Union meeting during working time. T618:16-621:23 (Randy).

Mr. Pike testified that Ron Edgemon, a union official who did not testify at hearing, left his work station in KBA and traveled all the way to the Komori press to discuss quashing the decertification effort:

[Ron Edgemon] come to our press and started -- he was actually looking at Josh, but I was standing right here beside him, because I wanted to know what was going on. And he was telling him how we were doing the wrong thing, this is going to do nothing but hurt us, and he was trying to convince Josh -- and I guess, then, myself -- not to do this. That was one of the times -- I mean, that was right there in front of me. If that's what you're asking.

T547:3-23 (Pike). No one disputed this testimony.

Patricia Steinaway testified that she was involved in countless conversations in 2017 where Union business was being discussed:

A I know Leah would walk over when they were talking about -- when they got first started the negotiation for the Union contracts. They -- I would hear them talking about, you know, what they had been asking for, and what they felt the company wasn't giving them, type thing.

Q And when were -- when did this take place? You said during the negotiations.

A Well, the contract negotiations started October of 201[7], and I think it's still going on.

Q And how did you hear this?

A Part of walking through and doing my job, I would have to check while Steve was running the press. I would have to check to make sure the colors were right and everything was lined up the way it was supposed to be, so I'd be in there checking stuff like that.

Q Did a union member ever approach you about union business while you were working?

A Yes

Q Can you tell us what happened?

A Well, there was one time when the company was getting rid of a position and the Union member asked me to sign a petition to save that position so that they didn't get rid of it. And I know I got asked by more than one union member during working hours about, you know, why I didn't like the Union; why I didn't want to be a part of the Union; come on, don't I need to be a part of the Union.

T438:10-16 (Steinaway). No one disputed this testimony.

Finally, Randy offered uncontradicted testimony that he allowed a union meeting to continue on the clock at the start of most participants' shift for 20 minutes even though participants were due to begin duties and their failure to do so was preventing others—as well as themselves—from starting their daily duties. T618:16-621:11 (Randy). Though other undisputed examples of Joe Pike or Patricia Steinaway observing Union business conversations during working time on the floor, this meeting actually prevented people who should have been performing tasks at the time they were meeting from doing their tasks but it was allowed to continue and no one was disciplined.

In the context of this undisputed testimony from four witnesses, culminating in the above 20 minute meeting recounted by Randy, allowing Joe Pike, after squaring away his press at shift end, to solicit cards in a non-work area from third shift employees before their shift even started cannot remotely be deemed disparate enforcement of the solicitation rule. Those in the meeting had specific tasks to perform; Joe did not. T606:24-607:6 (Randy), 529:12-21, 595:7-24 (Pike). Those in the meeting were keeping others from starting their tasks; Joe was not. T621:14-22:9 (Randy); 530:7-9 (Pike); see T595:7-24 (Pike).

In the face of these undisputed examples of consistent rule application, together with the testimony of three stewards that employees can speak on any subject on the floor and on the

clock as long as they do not interfere with the actual tasks of others, the GC can offer nothing to meet his burden. WestRock clearly allowed all parties to engage in lawful solicitation and distribution activities under the same conditions for §7 purposes. The fact that the Union did not choose exactly the same means within WestRock's rule as did Pike does not obligate WestRock to forbid Pike's activity, and WestRock would have violated Pike's §8(a)(1) rights if it had. See supra note 1. Thus, Complaint ¶7 must be dismissed.

**B. The GC Did Not Prove the Sheila Smith Allegations**

The GC did not prove that, as Complaint ¶¶8(a)-(c) claims, Sheila Smith out of the blue one day asked union steward Walker to get decertification cards from Joe Pike and give them to her nephew and his coworker. All but Walker denied it.<sup>32</sup> It makes no sense under the circumstances.<sup>33</sup> Walker's accounts are inconsistent with others<sup>34</sup> as well as internally inconsistent.<sup>35</sup> Complaint ¶¶8(a)-(c) must be dismissed. See Vernon Mfg. Co., 219 NLRB 622,

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<sup>32</sup> Compare T115:9-25 (Steward Walker) with 514:16-20 (Smith); 483:10-17 (Lawrence; no discussion with Aunt Sheila), 484:10-17 (Lawrence; never discussed card with Aunt Sheila); 484:17-22 (Lawrence; nothing kept him from going to Pike); 485:11-16 (Lawrence; Steward Walker is not close to Sheila); 512:2-20 (Smith; no relationship with Steward Walker); 513:14-17 (Smith; Walker shop steward).

<sup>33</sup> Taylor Walker conceded he is a well-known union supporter and former union shop steward. T111:3-6. Current Shop Steward Steve Brown admitted Taylor Walker was a known union supporter. T195:17-21, 196:7. Current Shop Steward Leah Johnson also admitted Taylor Walker was a known union supporter. T104:10-12. It defies logic to believe that senior supervisor Sheila Smith would risk violating the law to approach an open and obvious union supporter to whom she never spoke to ask him to deliver cards to her own nephew and his coworker. T127:2-7, 125:17-19. Further, the logistics alone are impossible to understand. Taylor Walker worked in the Litho Department. T121:5. Sheila Smith worked in the Finishing Department, a fact even Taylor Walker concedes. T124:3-5; see also T509:21-23 ("Taylor Walker is -- right now he's a material handler over in the litho part, which is across the road from my finishing department."); 510:7-8 ("No, that's another world across the road, and that's not my world."). These are distinct departments, separated by hundreds of feet and dozens of hourly employees, Team Leads and supervisors scattered between. (See RX-3).

<sup>34</sup> Compare, e.g., T94:14-18 (Steward Johnson; Walker spoke to her face-to-face in parking lot after shift) with 127:24-128:3 (Steward Walker; it would not even make sense to speak to Steward Johnson face to face then).

<sup>35</sup> Compare T130:25-131:9 (denies Union said keep quiet) with 131:21-132:5 (admits opposite under oath to Board agent).

622 (1975) (no proof by "preponderance of evidence" when the "overwhelming weight" of 15 witnesses contradicted the GC's version of the facts).

**C. The GC Did not Prove a Ford Raise Promise**

The GC did not prove, as Complaint ¶11(a) contends, that Randy promised a raise. The CBA controlled the employee's wages, and her job's rate could not change unless the contract was renegotiated or eliminated. Though she knew that, T255:12-21 (Ford), she had asked Randy for a raise numerous times before. T256:20-22 (Ford), 608:4-13, 609:4-10 (Randy). No one testified Randy ever conditioned a raise on the Union's elimination. See T609:24-610:2 (Randy). All witnesses agreed he simply told the truth—that he could do nothing to change her pay until either the contract changed or the Union and its contract were no more. T239:1-4, 255:12-21, 258:16-259:1 (Ford); 607:14-609:3 (Randy). Those were the only two options that would enable her to get a raise in her current position.

Unchallenged testimony established the truth of Randy's response:

Q. And Charlie asked Randy when are we going to get this girl paid?

A. Yes.

Q. And Randy told Charlie what? I didn't hear your answer the first time.

A. He said there's nothing I can do about it until the agreement goes through or the union is out.

T258:5-11 (Ford).

Randy explained without contradiction that he could not unilaterally increase her pay rate, and that it was only the need to correct the implication that it was Randy alone who had this ability, and to set the record straight, that caused him to make the comparison. T607:14-609:10. Randy's statement in context was not a promise to grant an increase if employees voted to

decertify.<sup>36</sup>

Randy only stated the obvious, which Jamie Ford acknowledged. T258:16-259:1. Pay is governed by the collective bargaining agreement (which embodies the parties' negotiated pay rates). Ford's statements that the contract does not explicitly cap lead pay, and that she sought a wage increase and not a wage decrease does not change this.<sup>37</sup> Such a statement is not a promise of anything or otherwise unlawful, no matter the effect it had on Ms. Ford. "Otherwise lawful statements do not become unlawful, however, merely because they have the effect, intended or otherwise, of causing employees to abandon their support for a Union."<sup>38</sup> Complaint ¶11(a) must be dismissed.

**D. The GC Did Not Prove a March 22 Promise**

The GC did not prove Randy made Complaint ¶12(a)'s promises during his March 22 meeting. All agreed Randy read his remarks. T42:15-24, 75:7-9 (Steward Johnson), 150:8-10 (Frost); see T610:10-23 (Randy). All agreed GC-4 was what he read. T42:15-24 (Steward

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<sup>36</sup> Randy answered the question truthfully, as he is required to follow what is in the contract. See NLRB v. Wooster Div. Borg-Warner Corp., 356 U.S. 342, 348-50 (1958) (the Act ordinarily requires bargaining with respect to those "mandatory" matters that fall within "wages, hours, and other terms and conditions of employment"); Oak Cliff-Golman Baking Co., 207 NLRB 1063, 1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975)(an employer's unilateral change of unit employees wage rates during the term of a collective-bargaining agreement amounts to a repudiation of the agreement which is not merely a breach of contract but "amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship."); St. Agnes Medical Center, 287 NLRB 242 (1987) (during the term of the agreement, it is not impasse that is the legal requisite to a change of the wage rates, a mandatory subject of bargaining; rather consent is the requirement.).

<sup>37</sup> See Mack Trucks, 294 NLRB 864 (1989) (employer's unilateral increase in new wage rate because the employer had "a great deal of difficulty obtaining any qualified person who was willing to work for the starting rate fixed by the collective-bargaining agreement" held to be unlawful); Standard Fittings Co. v. NLRB, 845 F.2d 1311 (5th Cir. 1988) (economic necessity is no excuse or defense to the unlawfulness of an employer's unilateral change to a mandatory subject of bargaining).

<sup>38</sup> Lee Lumber & Bldg. Material Corp., 306 NLRB 408, 410 (1992); see also Cumberland Shoe Co., 160 NLRB 1256, 1259 (1966).

Johnson), 169:22-170:4 (Steward Brown), 239:21-240:12 (Ford), 282:3-8 (Bearden), 443:17-24, 468:11-25, 474:1-8 (Steinaway), 483:4-9, 490:17-23 (Lawrence). A review of GC-4 reveals no promises. The GC has not satisfied his burden.

Lee Lumber, 306 NLRB 408 (1992), makes clear that the Employer's mention of the decertification petition and the procedures for filing it did not coerce or interfere with employees' §7 rights, and did not violate §8(a)(1). Id. Randy did nothing more. Complaint ¶12(a)'s pre-petition allegations must be dismissed.

### **III. Post-Petition ULP Allegations Fail**

The GC fares no better with post-petition ULP allegations. He failed to prove Randy made Complaint ¶11(b) promises telling Bearden and Frost what retirement Randy's son got at a non-union plant and Complaint ¶9's contention regarding his receiving Ken Frost's folded document, failed to prove Complaint ¶12(a)'s promises made at a scripted March 27, 2017 meeting. The GC failed to prove Complaint ¶12(b)'s contentions that the Conway employees were agents or that they made unlawful promises. The GC failed to prove Complaint ¶12(c)'s contentions that Scott Pulice used slides 54 times denying promises to make unlawful promises in explaining union free plant retirement differences from the Union's plan for Chattanooga employees, or from illustrating the difference when an employee asked. He failed to prove Complaint ¶13's claim that a chat among friends was interrogation.

#### **A. The GC Did Not Prove the Randy Reed March 27 ULPs**

The GC failed to prove Complaint ¶9's claim that on March 27, 2017, Randy offered more than ministerial help when Frost handed him a folded slip of paper. Complaint ¶11(b)'s claim that talking about his son's retirement in response to Bill Bearden's question constituted a promise, and Complaint ¶12(a)'s claim he made promises in a post-petition scripted speech. This

is grasping at straws. Employees gave employees unsolicited documents regularly, answering a retirement question with facts is not a ULP, and nothing in the scripted speech reflects a promise.

Regarding Complaint ¶9, Ken Frost, an hourly employee, handed Randy a folded piece of paper without identifying what it was, and without being asked. T155:6-11, 159:5-10 (Frost), 615:7-616:15 (Randy). It was Mr. Frost's idea to hand the signed, folded card to Randy, and Mr. Frost never told Randy what the card was. T158:9-22 (Frost). No one else gave Randy a card. T616:16-25 (Randy). No one contradicts this testimony.

Receiving a card from one employee is no ULP. Like the supervisor in Eastern States Optical Co., 275 NLRB 371 (1985), Randy (1) did not solicit an hourly employee's decertification vote; (2) was presented with a card only *after* the employee made an independent choice to decertify; (3) only acceded to an employee's voluntary request for directions on making their previous choice operative; and (4) was in a situation in which the petitioner (here, Joe Pike) had already obtained the requisite showing of interest as the petition had been filed three days earlier. Employer interaction with even three employees is not a violation. Poly Ultra Plastics, 231 NLRB 787, 787 n.2 (1977).

Regarding Complaint ¶11(b), Randy responded to 401(k) questions in a conversation with Bill Bearden and Ken Frost in which he explained the match his son was receiving at another plant that did not have a union. T141:25-42:24 (Frost), 285:3-286:6 (Bearden). No one said anything reflecting what would happen if the Union were decertified at Chattanooga, and no one made promises. T153:18-21 (Frost; no promises); 615:7-20 (Randy).

As discussed more fully in connection with Mr. Pulice's meeting below, see infra C., such comparisons are perfectly lawful absent promises **even if** the employer offers an opinion that employees would be better off without a union—an opinion undisputedly not offered here.

The GC did not ask Mr. Frost, the person to whom Randy was speaking, anything about this conversation. The GC has the proof burden. No admissible evidence contradicts this testimony.

Finally, the GC failed to prove Complaint ¶12(a)'s claim Randy made unlawful promises in a March 27 meeting in which he read from a script. All agreed he read GC-5. GC-5 contains no promises. T78:20-79:1 (Steward Johnson), 612:8-613:4 (Randy) and GC-5; see T153:18-21 (Frost; no promises), 444:13-445:21 (Steinaway; script), 446:6-7 (Steinaway; no promises). The Union Steward's notes confirm the foregoing. The GC offers nothing to the contrary.

The law guiding the disposition of Complaint ¶¶9, 11(b), and 12(a) is clear:

So in summary, the conduct of informing employees and expressing the company's viewpoint, were not joined with threats and promises. And under the case law, as I read it, were not unlawful.

They were not done in the context of other unfair labor practices and did not imply that any benefits would follow or detriments follow, whichever way the employees decided.

G & K Servs., Inc., Case 12-CA-20361, 2000 WL 33664322 (July 14, 2000) (ALJ Vandeventer).

Complaint ¶¶9, 11(b) and post-petition 12(a) allegations must be dismissed.

## **B. The GC Failed to Prove the Conway ULPs**

The GC failed to establish Complaint ¶12(b)'s contentions that the Conway employees were agents and failed to prove they made unlawful promises. They were not agents. Such meetings are lawful. They made no unlawful promises.

### **1. They were not agents.**

The GC failed to prove they were agents. An employer is not liable for the remarks and acts of employees who are not agents.<sup>39</sup> "The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would

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<sup>39</sup> Omnix International Corp. d/b/a Waterbed World, 286 NLRB 425, 426-27 (1987).

**reasonably** believe that the employee in question was reflecting company policy and speaking and acting for management... The Board considers the **position** and **duties** of the employee in addition to the **context** in which the behavior occurred."<sup>40</sup> See supra note 39.

Their jobs conferred no special status. WestRock in Conway, Arkansas has always employed former union steward Earl Johnson as an hourly maintenance employee (T320:4-6, 321:18-21 (Earl)), and Dave Brooks as either hourly or salaried non-exempt nonsupervisor. T377:6-8 (Dave). They did not have to go. Both Earl and Dave volunteered for the meetings in Chattanooga to tell others about their decertification experience in Conway. WestRock gave neither a message to deliver. T324:13-15, 329:7-330:11 (Earl); 383:20-384:10, 392:9-18 (Dave). The Board held that agents are held out as privy to management decisions or as speaking with the voice of management. *Supra* note 39. Earl and Dave made clear to Chattanooga employees that neither had authority or knowledge to say what could or would happen in Chattanooga.<sup>41</sup>

The GC offered no evidence from anyone attending their meetings that either said or did anything to the contrary.<sup>42</sup> Neither Earl nor Dave had any familiarity with WestRock Chattanooga employees.<sup>43</sup> Neither Earl nor Dave spoke of Chattanooga—they never spoke about

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<sup>40</sup> Manorcare Health Servs., 4-CA-36064, 2009 WL 196092 at 45-6 n.38. (Jan. 23, 2009)(ALJ Goldman) (emphasis added; citations omitted).

<sup>41</sup> T321:18-21, 322:20-22 (Earl), 375:6-11, 377:6-8 (Dave). Neither Dave nor Earl had any relationship whatsoever with management. See, contra, Tres Estrellas de Oro, 329 NLRB 50, 57 (1999)(ALJ Cracraft; **brother of company owner** who also owned a related family enterprise and visited the company's facility on occasion was a Sec. 2(13) agent, even though he no longer worked for company); Feldkamp Enterprises, 323 NLRB 1193, 1196-1197 (1997)(ALJ Pacht; semi-retired, **former owner and COO** of business, and father of current president, was 2(13) agent); Enterprise Aggregates Corp., 271 NLRB 978, 982 n. 18 (1984) (**daughter of company president** to whom employees addressed questions about insurance and other matters was a Sec. 2(13) agent); Moyle Constr., 18-CA-165458, 2016 WL 5462095 (Sept. 28, 2016) (ALJ Muhl) (**Family patriarch** found to be agent.).

<sup>42</sup> See RX-62 (Steward Johnson notes); 80:7-8 (Johnson), 322:8-22, 324:2-12 (Earl), 392:2-4 (Dave), 449:6-19 (Steinaway).

<sup>43</sup> Compare T357:8-15; 396:1-18 with Johnston Fire Servs., LLC, JD-14-17, 2017 WL 1035780 (Mar. 3,

Chattanooga but only about their experiences during the decertification campaign at WestRock's facility in Conway. T329:7-330:11 (Earl); 383:20-384:10; 392:9-18 (Dave). Finally, as everyone who worked at Chattanooga confirmed, neither wore any specific uniform that would suggest any supervisory or spokesperson authority. T357:20-24 (Earl); 379:16-22, 379:25-380:1 (Dave); 624:24-625:9 (Randy).

**2. Such meetings are lawful.**

This meeting was lawful. The Board has held even overt antiunion meetings lawful. Manhattan Hosp., 280 NLRB 113, 126-127 (1986). In Manhattan Hospital, supervisors "made arrangements to facilitate" employees' attendance at an antiunion meeting. Id. At hearing, an hourly employee who attended the meeting described it. She noted that approximately 20 employees attended a meeting held by the Company attorney to "answer any questions they had" about a decertification effort. Id. According to witness testimony, the Company attorney made clear that "management had nothing to do with the meeting, and that he was there to answer any questions they had." Id.

**3. There were no unlawful promises.**

Whether or not they were agents, the GC never offered evidence that either made unlawful promises or statements. No challenged statements were made. No statements made were unlawful.

No challenged statements were made. No one made reference to "read between the lines" or any other statement such as the GC alleges. Both Eael and Dave denied doing so,<sup>44</sup> no one in

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2017) (ALJ Locke) ("On a daily basis, Oliver dealt with Respondent's employees, and job seekers, concerning matters related to their employment. Employees reasonably would regard what she told them as reflecting company policy.")

<sup>44</sup> T325:23-326:10 (Earl), 388:11-14 (Dave); 57:7-11 (Johnson; no promises); 450:2-6 (Skinner).

attendance could confirm any such statements, and (though her parroted story differs) Union Steward Leah Johnson's own meticulous hand-written notes do not mention anything about supervisory status, agency status or "reading between the lines".<sup>45</sup> Steward Brown is too confused to credit.

It simply is not credible to believe the heretofore accurately designated union scribe Steward Johnson nowhere recorded this phrase in contemporaneous notes, yet somehow "recalled" it after making those notes but during GC witness preparation before hearing:

Q. Do you see [on GC-6 page 6] where it makes reference to David Brooks and Earl Johnson?

A. I do.

Q. Do you see where it says they made no promises and have no authority to do so.

A. Yes.

Q. And did Scott [Pulice] ever say anything different, Scott Pulice say anything different about David's or Earl's authority.

A. No, not that I recall.

Q. Did Earl or David say anything different about their authority?

A. No.

T91:13-24 (Steward Johnson).

Steward Brown does not help. He was hopelessly confused about what they said, and did not credibly testify as to his recollection, as he could not recall who David and Earl were. T207:13-15, 208:2-7, 208:13-16. Patricia Steinaway, David and Earl, on the other hand, offer a consistent, logical account of these meetings. T322:20-22, 324:2-15, 325:23-326:10, 327:18-328:3 (Earl); 375:6-11, 393:23-394:21 (Dave); 446:8-17, 449:11-450:8 (Steinaway). When the

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<sup>45</sup> T327:3-10 (Earl); 394:18-21 (Dave), 450:23-451:1 (Steinaway).

Union's own notes confirmed the accounts of all witnesses not holding Union office, this "read between the lines" comment clearly was never made.

Based on the foregoing, Complaint ¶12(b) must be dismissed.

**C. The GC Failed to Prove Pulice Meeting ULPs**

The GC failed to prove Scott Pulice made Complaint ¶12(c)'s alleged unlawful promises. To be §8(a)(1) violations, Pulice's statements must be either promises of benefits or statements reasonably intended to coerce the employees into voting for decertification but not opinions or statements of fact. They were neither. There is no dispute.

The slides themselves and testimony about them reflected he simply confirmed the facts that union free plants had better 401(k) matches than the one the Union negotiated for Chattanooga employees (GC-6), and, in response to a question, offered an example of how someone making \$40,000 per year would fare using the more favorable match. T62:10-64:1 (Steward Johnson), 249:24-250:2 (Steward Brown), 653:10-15 (Randy). Neither he nor his slides ever said that match would be available at Chattanooga (T216:6-10 (Steward Brown)), he and his slides made clear he could not promise that (T216:6-10 (Steward Brown), 455:18-24 (Steinaway)), and the GC offered no contrary testimony.

An employer has a right to compare wages and benefits at its nonunion facilities with those received at its unionized locations. The Board has repeatedly held that providing such information is not unlawful. E.g., Langdale Forest Prod. Co., 335 NLRB 602 (2001); TCI Cablevision, 329 NLRB 700 (1999); Viacom Cablevision, 267 NLRB 1141 (1983). While employers may not make promises as inducements to decertify a union, they may express their opinion or make factual statements. Section 8(c) of the Act explicitly provides that "the expressing of any views, argument, or opinion ... shall not constitute or be evidence of an unfair

labor practice ... if such expression contains no threat of reprisal or force or promise of benefits."  
29 U.S.C. §158(c).

It is lawful for an employer to offer an opinion, based on such comparison, that employees would be better off without a union. Absent accompanying promises or threats, the Board normally treats such comments as statements of opinion protected by 8(c)'s free speech provision. Thomas Industries, 255 NLRB 646 (1981), enf. denied on other grounds 687 F.2d 863 (6th Cir. 1982); S. S. Kresge Co., 197 NLRB 1011, 1012 (1972).

The slides read to employees during Pulice's meetings are not in dispute. (GC 6). The only allegation regarding unlawful promises involves Leah Johnson's testimony that at the end of one group meeting on third shift, Scott Pulice used math to demonstrate how 401(k) savings plans worked over time in response to an employee question. Under the Viacom standard, a comparison of wages may only be objectionable if there is an employer promise of benefits that is either express or implied from the surrounding circumstances. Viacom Cablevision, 267 NLRB 1141 (1983).

There were no such promises, here. To the contrary, Scott Pulice stated 54 times that he could not make promises and was not making any promises.<sup>46</sup>

What the Board noted in a similar context is true here as well:

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<sup>46</sup> See Uarco, Inc., 216 NLRB 1, 1-2 (1974)(although holding the employer at least "impliedly solicited complaints and grievances from employees," the Board found no ULP because the employer "effectively rebutted the inference of any implied promises of benefit" because the employer repeatedly told employees that it could make no promises in regards to their grievances); Shalom Nursing Home, 276 NLRB 1123 (Sept. 1985)(Board found no §8(a)(1) violation of promises because "repeatedly told employees during a series of pre-election meetings that he could not and would not make any promises about terms and conditions of employment. [Respondent] told employees he would be fair with them. At one meeting, in response to questions from employees about wages and benefits, [Respondent] briefly referred to wage increases and bonuses received by nonunion nurses as an example of how he dealt with employees. The employees asked [Respondent] if they would get increases and bonuses. [Respondent] replied that he would not make any promises other than to be fair.").

Respondent's August 30 newsletter and its antecedent speeches on August 28-30 to employees were lawful. While castigating the newsletter and speeches as an artful conveyance of an implicit unlawful promise of benefits in order to secure the Union's ouster, the dissent itself engages in an artful, but ultimately unpersuasive, paragraph-by-paragraph parsing of the Respondent's language. For example, the dissent finds an implied promise in the Respondent's express disclaimer of the intent to make any promises. It infers a promise to pay employees more, in the absence of a collective-bargaining representative, from an accurate description of the statutory obligation to bargain instead of taking immediate unilateral action. It suggests illegality in an accurate comparison of the wage rate history of the Respondent's unionized plant with its nonunion plant and in an apparently accurate description of the Union's willingness in past negotiations to accept below-average wages. Finally, while not directly challenging the judge's view that there were no unlawful statements in the Respondent's speeches, the dissent nevertheless finds that these speeches provide further context for understanding the unlawful promises allegedly implied in the newsletter.

In sum, the dissent's approach signals a fundamental unwillingness to accept the principle that **an employer has a right to make comparisons or descriptions that are unfavorable to an incumbent union during a decertification election campaign.**

Langdale Forest Prod. Co., 335 NLRB 602, 603 (2001) (emphasis added).

Viewed through the Langdale Forest Product prism, what Scott Pulice did compels the same conclusion here:

He went through each one [slide], read it off. At the end, he talked about 401(k), and he did a little diagram on the board **of the potential** of the 401(k) **if we had a certain percentage that was being matched by the Company.** . . . I just know he talked about how, basically, you **can** be a millionaire by the time you're ready to retire. **If you put your money away with this type of 401(k) match,** this is how much you would have by the time you're ready to retire.

T62:6-64:12 (emphasis added); see T453:1-7, 454:4-456:12.

Put simply, "[t]he Respondent here did not threaten to bargain in bad faith or to retaliate against employees if they failed to reject the Union. It expressly disclaimed the ability

to promise improvements in wages and benefits.” Id. at 603. There was no trace of any company effort, however subtle, to plant the seed of hope of increased wages and benefits if the Union were decertified and no other plan of threat or promise to influence the vote of its employees. Pulice's presentation is protected by 8(c), as the record from those present when the statements were made all confirmed that Pulice had simply been comparing the benefits with WestRock's unionized and non-union plants.

Consider the vast difference between Pulice's presentation and facts satisfying the GC's burden. See NLRB v. Drives Inc., 440 F.2d 354, 359-60, 363-64 (7th Cir. 1971)(survey distributed to employees requesting suggestions for improvements in working conditions and letter and statement that employer intended to make improvements consistent with its financial ability to do so); Grandee Beer Distributors, Inc. v. NLRB, 630 F.2d 928, 930-32 (2d Cir. 1980) (manager stated that he was working on health and sick leave plans); NLRB v. Garry Mfg. Co., 630 F.2d 934, 942-44 (3d Cir. 1980) (supervisor informing employees that union could not promise any more wages than he could). Each of these cases involved a fairly explicit promise rather than merely a statement that wages and benefits might be "better" if the union were decertified. Pulice not only made no such promises; he discarded them 54 times.

Based on the applicable law and on what Pulice's presentation was and was not, Complaint ¶12(c) must be dismissed.

**D. The GC Failed to Prove Friends' Conversation was Interrogation**

Finally, the GC failed to prove Complaint ¶13's interrogation allegation that Randy "interrogated ... employees" on April 4, 2017. At hearing, the only evidence presented by the Counsel for the GC centered on Randy's conversation with Steward Brown on April 4, 2017. Randy's conduct did not violate the Act. In analyzing an interrogation charge, the Board

considers "(1) the [employer's] background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." Rossmore House Hotel, 269 NLRB 1176, 1178 n. 20 (1984) (relying on factors from Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964) (per curiam)).

Applying these factors, no unlawful interrogation occurred T188:24-189:6 (Steward Brown), 617:16-618:6 (Randy)). Randy and Steward Brown regularly discussed all kinds of subjects. On the day in question, Randy asked Brown if they had a problem because Randy correctly read Brown's posting and calling Randy a liar, T618:7-13 (Randy); when Brown said no, they proceeded to other subjects. T618:13-15 (Randy); 189:9-13 (Steward Brown). The only two testifying parties to the conversation agree Randy never asked about union activity or interrogated Brown about his decertification views or Union business. Id.

Steward Brown's direct examination account of the conversation reflects he felt no threat or interrogation: "We sat and talked about how good our plant's doing and our sister plant's not doing so well in Kimball. And we just basically sat and chatted after that. . . Basically, I told him I had to go. I take my children to school so I had to end it. We ended with a handshake." (T182:8-15). The Board has found interrogations lawful under similar circumstances. Campbell Soup Co., 170 NLRB 1547, 1550 (1968) (supervisor's casual question in his office to bargaining unit employee, "why the girls []s should have a union in the plant" lawful because, "[t]he inquiry, in and of itself, was not coercive or threatening.")

Far from seeking union sympathies or information, Randy simply wanted to ask the logical question in response to such a hateful message posted about him online, and neither Steward Brown nor Randy thought otherwise. T618:7-13 (Randy). As Steward Brown explained,

Q So do you think Randy did anything improper in sitting down to talk with you about this [Facebook post]?

**A No, sir.**

Q Okay. Did Randy interrogate you about anything you didn't want to talk about?

**A Well, we just discussed what I had said earlier about what I had posted.**

Q Sure. Did Randy ask you anything about your union activities that you were trying to keep a secret that weren't already out in the open?

**A No.**

Q And just so we can get some perspective for the Judge here about why Mr. Reed would call you in for a meeting about this Facebook post. Let's be very frank with each other. In this Facebook post, you were calling him a liar, weren't you?

A Basically. And we discussed that, sir.

Q Not basically. Yes.

A Yes, I did.

**Q You were calling Randy Reed a liar by this Facebook post, weren't you?**

**A Yes.**

Q And does it bother you, Mr. Brown, if someone calls you a liar on the Internet?

A Yes.

Q And would it bother you if someone took a screenshot of that and passed it around the plant, and you saw that somebody you worked with was calling you a liar? Would that bother you?

**A Yes, sir.**

T188:21-189:23 (emphasis added).

There was nothing intrusive about the meeting; Randy focused only on his name—not Union issues and not anything Brown did not want to discuss. Id.; 188:24-13. Focusing on the *only* relevant inquiry, – whether the alleged questioning would tend to coerce the employee in

exercising his Section 7 rights – it would not. Even if this conversation is deemed interrogation, it still does not violate the Act because Mr. Brown's views both on the decertification issue and the specific content of his Facebook post were open and notorious. "Since the alleged interrogation involved two very open union supporters, I conclude that it did not violate the Act." MikLin Enterprises, Inc., 361 NLRB 283, 306 (2014) (ALJ Amchan's decision); Rossmore House, 269 NLRB 1176 (1984), aff'd, 760 F.2d 1006 (9th Cir. 1985).

There was nothing coercive about the meeting. Brown and Randy were friends who often held candid discussions. There was nothing coercive about the tone; Randy acknowledged Brown's rights from the outset. T180:10-11. Nor was Brown a wilting violet. He was a longtime shop steward used to asserting himself when necessary. T187:15-17, 23-25 (Brown was used to being held accountable and defending the union). The location of the alleged interrogation here had no coercive trappings. Randy and Steward Brown met not in Randy's office, but in a front-line supervisor's open air office space on the floor. T178:20-22. Montgomery Ward & Co., 146 NLRB 76 (1964)(Board considers alleged interrogation location convenience in deciding whether or not an interrogation was coercive). Thus, Complaint ¶13 must be dismissed.

#### **IV. The Previously Docketed RD Election Should Proceed**

"[T]he need to effectuate employee freedom of choice is as equally an important goal as is the need to deter and remedy employer misconduct. In balancing between these two important goals the board must derive a remedy which "effectuate the policies of this Act." Daisy's Originals, Inc. of Miami v. NLRB, 468 F.2d 493, 503 (5th Cir. 1972) (bargaining order was not warranted where the unfair labor practices committed were merely technical violations of the Act which did not dissipate the Union's majority and did not prevent a fair decertification election). In determining whether illegal conduct interferes with an election such that it must be set aside,

the Board considers the factors set forth in Bon Appetit Mgt. Co., 334 NLRB 1042 (2001).

Board precedent makes clear that even objectionable conduct rising to the level of unfair labor practices does not warrant setting aside the election<sup>47</sup> when, based on (1) the number of violations, (2) their severity, (3) the extent to which the conduct is disseminated, (4) the unit size, and (5) other relevant factors, it would not have materially affected the outcome of the election. Id. In short, the "violations" alleged by the Teamsters 197, at best, were isolated, few in number, were not severe, and were not widely disseminated.<sup>48</sup>

With regard to the first factor, the Counsel for the GC promised it would prove via objective evidence that numerous unfair labor practices occurred. They have failed. With regard to the first factor of Bon Appetit, the number of violations, the Counsel for the GC promised they would prove almost one dozen allegations. They have failed to present credible evidence regarding any pre-petition allegations, and only the most threadbare evidence regarding post-petition allegations.

With regard to the second factor of Bon Appetit, the proven unfair labor practices' severity, this case involves no severe violations--no §8(a)(5) refusals to bargain, no §8(a)(3) discrimination, and no §8(a)(1) threats of plant closure.

With regard to the third factor of Bon Appetit, the extent to which the conduct is disseminated, only four union witness employees testified about comments, ranging from one on

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<sup>47</sup> Here, Petitioner Pike's RD petition was dismissed without a hearing, running afoul of Master Slack. See Saint Gobain Abrasives, Inc., 342 NLRB 434 (2004) citing Master Slack, 271 NLRB 78 (1984) ("We conclude that such a factual determination of causal nexus should not be made without an evidentiary hearing.")

<sup>48</sup> See Vernon Mfg. Co., 219 NLRB 622 (1975) (the Administrative Law Judge found, and Board agreed, that Supervisor Hazel Smith's interrogation of, and threats to, employees violated §8(a)(1); but found further that her single instance of interrogation and threat was not sufficient to taint the entire solicitation of decertification authorizations or to require finding that the authorizations were coerced.)

one conversations, small groups, isolated work areas to shift meetings. There was no evidence that dissemination of any unlawful act. See Bon Appetit Mgmt. Co., 334 NLRB 1042 (2001) (holding that statements made by a low-level supervisor to a single employee in unit of over 200 employees, two to three weeks prior to the election at the employee's regular work station that were not disseminated to other employees could not have affected the results of the election); Metz Metallurgical Corp., 270 NLRB 889 (1984) (refusing to set aside election and holding that a "single isolated conversation between a low-level supervisor and one employee" where "only one other employee in a large unit of over 136 eligible voters" was aware of the conversation is "virtually impossible" to affect the results of the election).

With regard to the fourth factor of Bon Appetit, the unit size, WestRock has approximately 160 employees spread over three shifts in a plant of 235,000 square feet. If insufficient in Bon Appetit in a 200 employee unit, clearly such evidence does not warrant a new election in a unit close to the same size. See Clark Equipment Co., 278 NLRB 498 (1986) (holding that alleged incidents of election misconduct that involved only one or two employees out of a unit of over 800 employees, with no evidence of dissemination, were insufficient to set aside the election), overruled on other grounds, Nickels Bakery, 296 NLRB 927, 928 (1989).

With regard to the fifth factor of Bon Appetit, other relevant factors, we must distinguish between pre-petition and post-petition conduct. Furthermore, here, record evidence establishes that all employees were provided presentations containing lawful explanations of the decertification process. If Bon Appetit means anything at all, it means the petition must be reinstated, if the Petitioner so requests, on these facts. And, what the GC does not attempt to prove is just as important as what it has failed to establish, here: no allegations of or a prohibition against wearing Union paraphernalia, or plant closing threats, or discipline or discharge of Union

adherents, nor any of the other issues normally present when an election is set aside. Clearly, the foregoing compels the conclusion that the petition must be reinstated.

### **CONCLUSION**

Based on the foregoing, WestRock respectfully requests that the ALJ dismiss the unfair labor practices. This dismissal will enable the Regional Director to reinstate Petitioner Pike's petition, should he so request. In the alternative, WestRock respectfully requests that, if the ALJ sustains any unfair labor practice, the ALJ make sufficient factual findings such that the petition could still be reinstated under the Bon Appetit analysis, should Petitioner Pike so request.

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed with the Office of the Executive Secretary via Electronic Filing, on this the 23<sup>rd</sup> day of March, 2018:

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